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No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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This Court long ago concluded that the Export Clause, U.S. Const. Art. I § 9, Cl. 5, does not prohibit the United States from imposing a fee on exports that exacts "compensation * * * for services properly rendered." *Pace* v. *Burgess*, 92 U.S. 372, 375 (1876). "[R]evenue measures that operate only to compensate a government for benefits supplied" are not constitutionally proscribed, for the government "has an obvious interest in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)). Foreign commerce, like domestic commerce, "may be made to pay its own way" (*Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 281 (1977)). See, *e.g.*, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 266 (1935) (citing cases).

Respondent therefore ultimately acknowledges, as it must, that the prohibition in the Export Clause against a "tax or duty" on exports does not preclude Congress from imposing "a *bona fide* user fee" on exporters and other shippers who benefit from government services (Resp. Br. 42). The narrow question presented in this case is thus simply whether, under the standards that the Court applies for this purpose, the non-discriminatory port-use charge imposed on exports and other goods under the Harbor Maintenance Tax, 26 U.S.C. 4461(a), is a proscribed "tax" or is instead a permissible user fee.

1. Courts have been required to distinguish "taxes" from "fees" in a variety of contexts. "Yet, in doing so, they have analyzed the legal issues in similar ways." *San Juan Cellular Telephone Co.* v. *Public Service Commission*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.):

> They have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community.

By contrast, the classic "fee" is imposed narrowly on those who use and benefit from a governmental service and is designed to "rais[e] money placed in a special fund to help defray" the costs of providing that service. *Ibid.*

In every context in which this Court has addressed the distinction between a permissible "fee" and a proscribed "tax," the Court has explained that a "fee" is a charge imposed on those who use a government service that is designed to "defray the expense" of that

service (*Head Money Cases*, 112 U.S. 580, 596 (1884)). Fees designed to recover the costs of services that facilitate commerce—such as pilotage, tonnage, wharfage, and stevedoring charges—have consistently been upheld. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 267 ("Charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible"). This is because, as this Court held in *Packet Co.* v. *Keokuk*, 95 U.S. 80, 84 (1877), "a charge for services rendered or for conveniences provided is in no sense a tax or a duty."

In determining whether a governmental charge is a permissible "user fee" or an impermissible "tax" under the Export Clause, the Court has therefore focussed on whether the purpose of the charge is to earn revenue or is instead to compensate the government for "services properly rendered." *Pace* v. *Burgess*, 92 U.S. at 375. The Court has concluded that "[t]he point to guard against" is not the assessment of a "fee" that seeks to recover the costs of services rendered to exports but rather "the imposition of a duty under the pretext of fixing a fee." *Id.* at 367. See also *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901); *Moon* v. *Freeman*, 379 F.2d 382, 391 (9th Cir. 1967).[1]

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[1] The Taxing Power and the Commerce Power are distinct and independent sources of legislative authority. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196, 198-202 (1824). See also *Board of Trustees* v. *United States*, 289 U.S. 48, 58 (1933); Pet. Br. 14 n.4. The Export Clause limits the Taxing Power. It does not limit the authority of Congress to regulate interstate and foreign commerce through the imposition of fees that seek compensation for government services. See *Pace* v. *Burgess*, 92 U.S. at 375.

In *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978), the Court has concluded that a "fee" that compensates a government for services rendered to commerce does not constitute a "tax" if the fee (i) does "not discriminate against" a constitutionally protected interest, (ii) is "based upon some fair approximation of use" and (iii) is "not shown to be excessive in relation to the cost to the government of the benefits conferred." 435 U.S. at 464; see also *Evansville-Vanderburgh*, 405 U.S. at 716-717. For the reasons described in our opening brief and the additional reasons set forth below, the charge that Congress imposed on goods that move through the ports of the United States under the Harbor Maintenance Tax constitutes a valid "fee" for government services—and not a proscribed "tax"—under these established criteria.

2. Respondent argues, however, that the Court should reject the settled criteria that it has applied in distinguishing between proscribed "taxes" and permissible "fees." Respondent contends that, in determining whether the Harbor Maintenance Tax is proscribed under the Export Clause, the Court should formulate a different and stricter test than it has applied in all other contexts. Neither logic nor authority supports respondent's contention.

a. Respondent errs initially by asserting that there is "no Export Clause precedent for the approach urged by the Government" (Resp. Br. 15). In making that assertion, respondent seemingly overlooks the seminal decision in *Pace* v. *Burgess*, 92 U.S. at 375. That decision is, of course, "Export Clause precedent," for it arises under and interprets that Clause.

Moreover, the holding of *Pace* that the government may demand a "fee" as "compensation * * * for services properly rendered" (*ibid.*) has been reiterated by this Court in the many decisions that led to the formulation of the test adopted and applied in *Evansville-Vanderburgh* and *Massachusetts*. See, *e.g.*, *Evansville-Vanderburgh*, 405 U.S. at 712-713, quoting *Hendrick* v. *Maryland*, 235 U.S. 610, 624 (1915) ("where a State at its own expense furnishes special facilities for the use of those engaged in commerce, * * * it may exact compensation therefor"); *Packet Co.* v. *Keokuk*, 95 U.S. at 84. The Export Clause precedent in *Pace* was the root of, not an exception to, the test adopted by this Court to distinguish between proscribed "taxes" that raise general revenues and permissible "fees" that seek "compensation * * * for services properly rendered" (*Pace* v. *Burgess*, 92 U.S. at 375).

Respondent attempts to distinguish *Pace* as involving only "a limited government fee * * * designed solely to cover the government's admininstrative expenses" in enforcing the revenue laws (Resp. Br. 17). That effort to limit *Pace* to its facts draws no support from the text or reasoning of that decision. In *Pace*, as in the contemporaneous decision in *Packet Co.* v. *Keokuk*, 95 U.S. at 84, the Court relied on the already well-established rule that a government fee that seeks compensation for services rendered to commerce "is in no sense a tax or a duty" (*ibid.*). As early as *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 298, 313 (1851), the Court had emphasized that "fees and charges for pilotage" and "port charges for services rendered to vessels or cargoes" are "distinct from" the "[i]mposts and duties" that the Constitution proscribes. In neither *Pace* nor any subsequent

case has the Court limited the established distinction between permissible user "fees" and proscribed "taxes" in the strained manner that respondent now proposes.

To the contrary, the decisions of this Court recognize that constitutionally permissible fees are *not* "limited * * * to * * * the government's administrative expenses" (Resp. Br. 17). The Court has long held that a government may properly seek compensation for *all* "services rendered to and enjoyed by [a] vessel" engaged in domestic and foreign commerce. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 266. To confuse fees charged for "services rendered" with the "taxes" and "duties" that are proscribed by the Constitution "would be to confound things" that this Court has long and consistently held to be "essentially different" (*Cooley*, 53 U.S. (12 How.) at 313).

b. Respondent nonetheless urges that any test employed to distinguish between "fees" and "taxes" under the Export Clause "should be narrow and consistent with the constitutional command that exports be immune from taxes and duties" (Resp. Br. 23). But to say that "taxes" are "strictly" proscribed by the Export Clause adds nothing to the constitutional text. Nor does such a statement refute the longstanding precedent of this Court that "fees" that compensate a government for services rendered to commerce are *not* proscribed precisely because such fees are "in no sense a tax or a duty." *Packet Co.* v. *Keokuk*, 95 U.S. at 84. See, *e.g.*, *Massachusetts*, 435 U.S. at 462-464; *Evansville-Vanderburgh*, 405 U.S. at 716-720. Even a "strict" enforcement of a prohibition against any "tax or duty" does not prohibit the assessment of a charge that is "in no sense a tax or a duty."

Indeed, this Court long ago rejected the suggestion that a constitutional provision that contains a "strict" prohibition against "taxes or duties" prohibits governments from charging fees that are designed to recover costs incurred in providing services to commerce. In *Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 265, the Court considered the effect of the constitutional "prohibition against tonnage duties" which, as the Court explained, supplements the constitutional prohibition against "duties on imports and exports." The Court stated that this provision (*ibid.*)

> has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port * * * .

The Court held, however, that this strict prohibition against "all taxes and duties" (*id.* at 266) (citing cases)

> does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage * * * or wharfage * * * or charges for the use of locks on a navigable river * * * or fees for medical inspection * * *.

c. Respondent similarly errs in asserting (Resp. Br. 18-21) that the test applied by this Court to distinguish between permissible fees and proscribed taxes in the *Evansville-Vanderburgh* and *Massachusetts* decisions has no relevance under the Export Clause. In deciding whether a charge for a governmental service is a "fee" or a "tax," it is obviously relevant whether the charge is "based upon some fair

approximation of use" and is "not shown to be excessive in relation to the cost to the government" (*Massachusetts* v. *United States*, 435 U.S. at 464). Those are simply definitional parameters of a permissible "fee" that seeks to recover "compensation * * * for services properly rendered" (*Pace* v. *Burgess*, 92 U.S. at 375). Indeed, respondent does not directly dispute that these two factors are appropriate in determining whether a "fee" is permissible.

Respondent suggests, however, that the third requirement of *Massachusetts*—that the fee "not discriminate against" a constitutionally protected interest (435 U.S. at 464)—"is an irrelevant factor" under the Export Clause because even non-discriminatory taxes may not be applied to exports under that Clause (Resp. Br. 20). That contention, however, misunderstands the logical underpinings of the "non-discrimination" requirement of the *Massachusetts* test. That requirement ensures that even an *otherwise* permissible fee—one that is properly designed to obtain compensation for services rendered by government—will not be sustained if that fee is charged *only* to export goods. A charge for services that is imposed *only* on exports would be "the imposition of a duty under the pretext of fixing a fee." *Pace* v. *Burgess*, 92 U.S. at 376.

In the present case, however, it is undisputed that the Harbor Maintenance Tax applies without discrimination to exports, imports and domestic shipments alike. See Pet. Br. 20-21 & n.10. All goods moving through the ports of the United States are equally required to pay compensation for the services provided by the United States to this commerce. 26 U.S.C. 4461(a).

d. Finally, respondent errs in its reliance upon *United States* v. *International Business Machines Corp. (IBM)*, 116 S. Ct. 1793 (1996), as support for a more "strict" test to distinguish between fees and proscribed taxes under the Export Clause. The question addressed and decided in the *IBM* case was "whether the Export Clause of the Constitution permits the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *Id.* at 1795. The Court held "that it does not." *Ibid.* That holding—and that decision in its entirety—addresses only whether an acknowledged "tax" may be applied to exports when the same tax also applies to other goods.[2] Nothing in that holding touches upon the analytically different issue presented in this case—whether the port use fee imposed by the Harbor Maintenance Tax is a proscribed "tax" or a permissible "fee." As long ago as *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) at 314, this Court admonished in a case arising under the Import-Export

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[2] At an earlier stage of this case, the government argued that, even if the Harbor Maintenance Tax were regarded as a "tax" rather than a "user fee" (Pet. App. 23a), this assessment would nonetheless be constitutional because it applies without discrimination to exports, imports and domestic commerce alike. During the pendency of litigation, the Court rejected an indistinguishable contention in the *IBM* case (116 S. Ct. at 1795). The government has therefore abandoned that position in this case and now raises only the claim that the Harbor Maintenance Tax is "a permissible user fee" under the analysis of cases such as *Massachusetts*, *supra*, and *Evansville-Vanderburgh*, *supra*. If the Harbor Maintenance Tax were a "tax or duty," the fact that it is nondiscriminatory obviously would not save it under this Court's decision in *IBM*. The decision in *IBM*, however, does not even indirectly address the wholly different question presented in this case.

Clause that to confuse fees with "taxes or duties"—as respondent proposes—"would be to confound things essentially different, and which must have been known to be actually different by those who used this language" in adopting the Constitution.

Nothing in *IBM* provides any support for a contention that the term "tax" has a meaning under the Export Clause that could encompass even a properly designed fee that seeks to recover the costs of providing government services to commerce. To the contrary, in describing the concept of a "tax" under the Export Clause, the Court emphasized that that term is to be given its "common" meaning. 116 S. Ct. at 1802. The decision in *IBM* does not address, and certainly does not reject, the holding of *Pace* v. *Burgess*, 92 U.S. at 375, that the government may impose a fee to obtain "compensation * * * for services properly rendered."

There is, in short, no authority for the proposition of respondent that a different test should be applied to distinguish between permissible "fees" and proscribed "taxes" in the Export Clause context than in other contexts. Moreover, contrary to respondent's contention, the United States is not arguing in this case for a "user fee exception" (Resp. Br. 10) to the "strict" prohibitions of the Export Clause. We are simply relying upon the established principle that a *bona fide* user fee that seeks compensation for government services provided to commerce "is in no sense a tax or a duty." *Packet Co.* v. *Keokuk*, 92 U.S. at 84. See also *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989); *Head Money Cases*, 112 U.S. 580 (1884); *Pace v. Burgess*, 92 U.S. at 376 ("proper fees * * * are in no sense a duty on exportation").

3. Respondent contends that the port-use charge imposed by the Harbor Maintenance Tax is a "tax" rather than a "fee" because it is not based upon a "fair approximation of use" and is "excessive in relation to the cost to the government of the benefits conferred" (*Massachusetts* v. *United States*, 435 U.S. at 464). Each of the arguments that respondent raises in support of that contention is incorrect.

a. Respondent initially errs in relying (Resp. Br. 24) on the fact that the word "tax" appears in the name of the statute. The Court has, in analagous contexts, frequently rejected that same formalistic contention. See, *e.g.*, *Fairbank* v. *United States*, 181 U.S. 283, 305 (1901) ("we must always regard things rather than names"); *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) at 313 ("certainly it is the thing, and not the name, which is to be considered"); Pet. Br. 15 n.5. As this Court stated in the *Head Money Cases*, 112 U.S. at 596, "the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax."[3]

b. Respondent contends that "the *ad valorem* nature" of the port-use charge makes it more like a tax or duty than a fee (Resp. Br. 36). That contention, however, again misconstrues form for substance. This Court has long made clear that the distinction between a "tax" and a "fee" turns on the character and purpose of the exaction, not its form. A "tax or a

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[3] Respondent incorrectly implies (Resp. Br. 24) that Congress conceived of the Harbor Maintenance Tax as a "tax" rather than a user fee. The legislative history explains, to the contrary, that the charge is not designed "for the purpose of raising revenue. Rather [it is] to repay costs related directly to the servicing of commerce." S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985); Pet. Br. 15-16.

duty" raises revenue for general purposes; a fee raises money from the beneficiaries of a particular government program or service for the purpose of "defray[ing] the expense" of that service (*Head Money Cases*, 112 U.S. at 596). The fee imposed by the Harbor Maintenance Tax is plainly not designed to enhance the general revenue; its proceeds are committed to a statutory Trust Fund and may be expended only for the purpose of maintaining and operating the Nation's ports. 26 U.S.C. 9505(c); Pet. Br. 15-20. The fact that Congress elected to employ an *ad valorem* methodology to collect this fee does not transmute this port-use charge into a tax. It is "the amount of the tax, not its formula, that is of central concern." *Evansville-Vanderburgh*, 405 U.S. at 716-717.

Ad valorem fees that are designed to compensate the government for the costs of providing special services to commerce have therefore consistently been upheld. *United States* v. *Sperry Corp.*, 493 U.S. at 60-61; Pet. Br. 26-27. In upholding such *ad valorem* charges, the Court has emphasized that there is no requirement of a precise relationship between the benefit received by an individual from the government service and the fee charged to that individual. "Perfect uniformity and perfect equality of taxation * * * is a baseless dream." *Head Money Cases*, 112 U.S. at 595. The requirement that the fee be "based upon some fair approximation of use" requires only a "fair" formula, not an exact one. There is no requirement "that the amount of a user fee * * * be precisely calibrated to the use that a party makes of Government services." *United States* v. *Sperry Corp.*, 493 U.S. at 60.

Respondent contends that *Sperry* is inapposite because, while "the award recipient in *Sperry* benefitted generally in proportion to the size of the award, thus justifying an *ad valorem* assessment, the same cannot be said in the [Harbor Maintenance Tax] context, where the higher value cargo simply does not equate with a higher return" (Resp. Br. 37). This argument misses the point. The harbor maintenance charge applies to the total value of the shipment—a shipper of high-valued cargo pays a lower total fee if the total value of its shipment is less than the total value of a lower-valued shipment. It was not unreasonable for Congress to conclude that the benefit derived from harbor services is proportional to the total value of the goods being shipped. Extensive testimony was presented to Congress that favored the adoption of an *ad valorem* fee over a port-specific fee or a flat tonage fee. See Pet. Br. 27-28. In electing to employ an *ad valorem* fee, Congress acted within "that latitude of discretion which the legislature is entitled to excercise in the selection of the means for attaining a constitutional object" (*Pace* v. *Burgess*, 92 U.S. at 376).

The fact that some *other* method for approximating use could have been adopted—and the possibility that some other method might even more closely "approximate" use by shippers—does not deprive Congress of its legislative discretion to choose among the competing alternatives.[4] As this Court stressed in *United*

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[4] In *Evansville-Vanderburgh*, 405 U.S. at 715-716, the Court noted that a state highway user fee based upon an *ad valorem* charge on motor vehicles had been upheld in *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950). The Court stated that such a fee "will pass constitutional muster, even though

States v. *Sperry Corp.*, 493 U.S. at 61, quoting *Massachusetts* v. *United States*, 435 U.S. at 463 n.19, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we decline[] to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation * * * .'"[5]

c. Respondent errs in contending (Resp. Br. 38-39) that a valid port-use fee must be based upon the separate cost structure of each separate port of the United States. The Court rejected an indistinguishable contention in *Massachusetts* v. *United States*, 435 U.S. at 468. In upholding a nationally-uniform federal charge for the use of airports, the Court stated that, even though the fee (*ibid.*)

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some other formula might reflect more exactly the relative use of the state facilities by individual users." 405 U.S. at 717.

[5] Respondent contends that, even if the Harbor Maintenance Tax otherwise qualifies as a valid "fee" on the use of the ports of the United States, it should be held to be unconstitutional simply because, as an *ad valorem* charge, it is similar in form to an export duty (Resp. Br. 26). That contention, however, fails to acknowledge that the form of the exaction is not controlling. In upholding a state-imposed charge for port services against a claim that the fee violated the Tonnage Clause of the Constitution, the Court held that this constitutional restriction on taxation does "not extend to charges made by state authority, *even though graduated according to tonnage*, for services rendered to and enjoyed by the vessel" (*Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 266 (emphasis added)). In any event, the port-use charge imposed by the Harbor Maintenance Tax is not a "duty" even in form, for (i) it does not seek to raise general revenues for the benefit of the public and (ii) it must be paid by domestic as well as international users of the Nation's ports. The port-use fee merely requires *all* commerce to pay its own way.

> does not, of course, give weight to every factor affecting appropriate compensation for airport and airway use * * * the present scheme nevertheless is a fair approximation of the cost of the benefits each aircraft receives. Every aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States. And even those aircraft * * * that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed and in that the provision of the services makes the airways safer for all users.

Respondent attempts to distinguish that decision by arguing that the civil aviation services at issue in that case were part of an "integrated national airsystem" while "[h]arbor services, by their very nature, are more location-specific" (Resp. Br. 38).[6] Although the system of ports and harbors may not be as pervasively integrated as civil aviation, the national water-

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[6] Respondent suggests that an exporter who ships from Miami gains no benefit from dredging services in Oregon (Resp. Br. 38). The same sort of extreme contention could, of course, have been made in *Massachusetts* about an exporter who ships by air from Miami. As the Court recognized in *Massachusetts*, however, such fact-specific hypotheticals understate the degree of integration of national systems of transportation. For example, a Pennsylvania shipper may ship exclusively through the port of New York. It nevertheless benefits from dredging operations at other ports because if those ports were not properly maintained, other shippers might divert their business to New York, placing a greater burden upon that port and resulting in higher costs or delays for the Pennsylvania shipper.

ways are unquestionably an integrated system of transportation. The fact that a shipper may elect to use one port today does not preclude it from using a different port in the future. All ports "are available for their use if needed" (*Massachusetts* v. *United States*, 435 U.S. at 468). Congress reasonably gave account to "the benefits provided by an interconnected system of freight transportation to all exporters" (Oregon Am. Br. 6) in selecting a nationally uniform fee.[7]

d. Respondent asserts (Resp. Br. 40) that the harbor maintenance fee is invalid because it is imposed on shippers rather than vessel owners. This Court squarely rejected that exact contention in *Evansville-Vanderburgh*, 405 U.S. at 714. See Pet. Br. 22. Respondent fails to cite or discuss that controlling authority in arguing to the contrary in its brief.

e. Finally, respondent contends that the harbor maintenance fee is unconstitutional because it is "excessive in relation to the federal costs of harbor maintenance" (Resp. Br. 42). Respondent bases this contention not on the situation that obtained when the payments at issue in this refund suit were made, but rather on the size of the current surplus that has

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[7] In upholding the nationally uniform airport fee in *Massachusetts* v. *United States*, 435 U.S. at 469 n.23, the Court explained that:

> The analogous decision is *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935), in which the Court held that a vessel that has not been the recipient of any police services could be required to pay a charge designed to defray their costs since the services redounded to the benefit of all vessels in the port.

since developed in the Trust Fund that Congress established for the collection and disbursement of the harbor maintenance fee. In rejecting the contention that such a surplus makes an otherwise constitutional fee invalid, the Court stated in *Massachusetts* v. *United States*, 435 U.S. at 470 n.25, that "a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years." This long-term view of appropriate funding is necessitated by the great expense and unpredictability of transportations needs. Congress appropriately "factor[s] in future development plans when setting user fees." *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Authority*, 906 F.2d 516, 522 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991).

If the fees collected were to become irreconcilable with the amounts ultimately to be expended from the Trust Fund, some adjustment of the rate of the fee or the services provided could ultimately become necessary. That determination is, of course, initially committed to Congress and proposals for reducing the rate of the Harbor Maintenance Tax or for adding navigation projects to be funded by the Trust have been submitted for its consideration. See Pet. Br. 18 n.8. On the record of this case, however, there is no evidence of any such permanent imbalance. During the years that the challenged fees were collected in this case, the surplus in the Trust Fund was less than the annual expenditures from the Fund. See *ibid.*; J.A. 104.

This is thus not a case in which the revenues collected exceeded the costs of services so greatly that the fee resembles the "imposition of a duty under the pretext of fixing a fee" (*Pace* v. *Burgess*, 92 U.S. at

376). The fees collected are impressed with a trust and may not be expended at any time for any purpose other than the operation and maintenance of harbor and port facilities. See Pet. Br. 19. The government has not "appropriated all, or most, of the award to itself and labeled the booty as a user fee." *United States* v. *Sperry Corp.*, 493 U.S. at 62. The fact that the Trust Fund ensures that the harbor maintenance fees are used only to fund the specific services for which the charge is assessed reflects that this charge is a valid "fee" for "services properly rendered" (*Pace* v. *Burgess*, 92 U.S. at 375). See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. at 62; *Head Money Cases*, 112 U.S. at 596.[8]

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[8] Amicus curiae Arctic Cat contends that the Court of International Trade lacked jurisdiction over this case and that jurisdiction instead lies exclusively in the Court of Federal Claims. In making that assertion, however, the *amicus* did not address (Am. Arctic Cat Br. 9) the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). The United States has consistently taken the position that jurisdiction exists in the Court of International Trade under that provision, rather than under 28 U.S.C. 1581(i). See Pet. App. 8a-9a; Pet. Br. 7-8 n.3. Whether jurisdiction is premised on subsection (a) or subsection (i), however, the Court of International Trade had jurisdiction to hear the present suit. Congress plainly intended this result, for the legislative history specifies that "the Court of International Trade is to have primary jurisdiction for actions involving the port user charge provisions" of the Harbor Maintenance Tax. S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1985).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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